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Attorneys for Defendants Power
Ventures, Inc. and Steve Vachani

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FACEBOOK, INC.,
 	
                                        Plaintiff,
 	
-against-
 	
POWER VENTURES, INC. d/b/a POWER.COM, a California corporation; POWER VENTURES, INC. a Cayman Island Corporation, STEVE VACHANI, an individual; DOE 1, d/b/a POWER.COM, an individual and/or business entity of unknown nature; DOES 2 through 25, inclusive, individuals and/or business entities of unknown nature,
 	
                                        Defendants.
	Case No. 5:08-cv-05780 JW
	
	REPLY DECLARATION OF L. TIMOTHY FISHER IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
	
	Date: January 23, 2012
	Time: 9:00 a.m.
	Courtroom 9 – 19th Floor
	Chief Judge James Ware

REPLY DECLARATION OF L. TIMOTHY FISHER
CASE NO. 5:08-CV-05780 JW

1   I, L. Timothy Fisher, declare as follows:

2   1.   I am a partner at Bursor & Fisher, P.A., counsel of record for Defendants Power

3 Ventures, Inc. ("Power") and Steve Vachani (collectively, "Defendants"). I am an attorney at law

4 licensed to practice in the State of California and a member of the bar of this Court. I make this

5 reply declaration in support of defendants' motion for summary judgment. I have personal

6 knowledge of the facts set forth in this declaration and, if called as a witness, I could and would

7 testify competently thereto.

8   2.   Attached hereto as Exhibit A are true and correct copies of excerpts from the July

9 20, 2011 transcript of the deposition of Steven Vachani.

10   3.   Facebook has requested a second deposition of Mr. Vachani. On September 22,

11 Facebook's counsel sent me an email requesting that Power "stipulate to a second day of

12 deposition with Mr. Vachani." On October 25, Facebook sent me a draft joint letter it intended to

13 submit to the Court requesting a second deposition of Mr. Vachani. Mr. Vachani agreed to a

14 second deposition, which is currently scheduled for January, 2012.

15   I declare under the penalty of perjury under the laws of the State of California that the

16 foregoing is true and correct, executed on December 12, 2011 at Walnut Creek, California.

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                                  L. Timothy Fisher

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EXHIBIT A

1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC.   :

          Plaintiff,   :

                                  :

     v.   :

POWER VENTURES, INC. d/b/a:

POWER.COM, a California   :

corporation; POWER   :   Case No.

VENTURES, INC. a Cayman   :   5:08-CV-05780

Island Corporation, STEVE :   JW (HRL)

VACHANI, an individual;   :

DOE 1, d/b/a POWER.COM, an:

individual and/or business:

entity of unknown nature; :

DOES 2 through 25,   :

inclusive, individuals   :

and/or business entities :

of unknown nature,   :

          Defendants.   :

_____

          HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

1   Videotaped Deposition of STEVEN VACHANI

2   taken on behalf of the Plaintiff at the offices of

3   BURSOR & FISHER, P.A., 369 Lexington Avenue, New

4   York, New York, on Wednesday, July 20, 2011,

5   commencing at 9:47 in the forenoon before PATRICIA

6   MULLIGAN CARRUTHERS, a Certified Court Reporter and

7   Notary Public of the State of New Jersey and Notary

8   Public of the State of New York.

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```
 1    A P P E A R A N C E S:

 2

 3    ORRICK, HERRINGTON & SUTCLIFFE, LLP

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 5    Menlo Park, California  94025-1015

 6    (650) 614-7375

 7    BY:  MONTY M.F. COOPER, ESQ.

 8         mcooper@orrick.com

 9    Attorneys for the Plaintiff Facebook, Inc.

10

11    LAW OFFICES OF SCOTT A. BURSOR

12    369 Lexington Avenue, 10th Floor

13    New York, New York  10017-6531

14    (212) 989-9113

15    BY:  SCOTT A. BURSOR, ESQ.

16         scott@bursor.com

17    Attorney for the Defendants Power Ventures, Inc.

18

19    Present:

20              Peter Ledwith, Videographer

21

22

23

24

25
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98

1   Q.   Does Myspace have friends list?   11:47

2   A.   They have friends list, yes.   11:47

3   Q.   Do they refer to them as friends?   11:47

4   A.   I don't know what they -- what   11:47

5   they have -- I would assume they call them friends.   11:47

6   Q.   Do you know if all the social   11:47

7   networks use the same terminology to describe the   11:47

8   content that is made available to their user?   11:47

9   A.   What terminology they use and what   11:47

10   terminology we use internally is irrelevant. It's   11:47

11   what it's actually doing. It's getting friends   11:47

12   list. If they want to call it pals or something   11:47

13   else, it doesn't change our, you know, our -- what   11:47

14   we have here. It's just a -- It's a -- It's doing   11:47

15   the same thing.   11:47

16   Q.   All right. If you want to   11:47

17   initiate a communication through the Web site, for   11:47

18   instance, www.facebook.com, is there a function in   11:48

19   the PowerScript that permits that communication to   11:48

20   occur?   11:48

21   A.   If a user is validly logged into   11:48

22   their account with full capability and they want --   11:48

23   they want to send a message to a friend, they --   11:48

24   they can send a message to a friend just like they   11:48

25   can -- just like on Facebook sends messages to   11:48

99

1	billions of friends that are instructed by the	11:48
2	users. Facebook has been doing that for -- for a	11:48
3	long time.	11:48
4	Q. Whose system is sending the	11:48
5	message, Facebook or Power's in that situation?	11:48
6	A. Facebook.	11:48
7	Q. All right. How is Facebook	11:48
8	instructed to send the message?	11:48
9	A. The user is instructing the	11:48
10	message to be sent.	11:48
11	Q. How is the user instructing the	11:48
12	message to be sent when they're logged into the	11:48
13	www.power.com Web site.	11:48
14	A. It's a browser. Power.com is a --	11:48
15	is a -- for practical purposes, it's a browser just	11:49
16	like Explorer. Obviously, it's a different -- It's	11:49
17	a Web page browser, so it's a browser within a	11:49
18	browser, but you -- they're -- they're logged into	11:49
19	Facebook. They're using Facebook site. They're on	11:49
20	the Facebook site and they're interacting with	11:49
21	Facebook just as they do on a day-to-day basis.	11:49
22	Just like if you turned on your browser and then	11:49
23	you go to Facebook, you're using the browser and	11:49
24	then you still go to Facebook. The best way to	11:49
25	think is Power browser is the way that they're	11:49

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1	Q. And their Facebook ID, for	11:53
2	instance, is a variable associated with the	11:53
3	power.com ID. Correct?	11:53
4	A. They would have given their user	11:53
5	name, their user name and password to Facebook	11:53
6	which the user has authorized and wants to store	11:53
7	with us in a secure manner. That's correct.	11:53
8	Q. But my question was: In your	11:53
9	database, the users' Facebook ID will be referenced	11:53
10	as a variable associated with the user ID of the	11:53
11	power.com Web site. Correct?	11:53
12	A. It would be referred to -- Yes.	11:53
13	Some unique ID and then their Facebook. Usually,	11:53
14	it's their log in user name and password.	11:53
15	Q. And the log in information is also	11:53
16	simply a variable associated with the power.com ID	11:53
17	of that user. Correct?	11:53
18	A. The log in information is a	11:54
19	combination of that unique ID and the information	11:54
20	that they have uniquely shared saying this is my	11:54
21	user name and password for Facebook when they log	11:54
22	in.	11:54
23	Q. Okay.	
24	A. So both of those pieces of	11:54
25	information.	11:54

104

1	Q. So when the user logs into	11:54
2	power.com, the user ID associated with that user in	11:54
3	your database recognizes the registration	11:54
4	credentials in its own database that go to	11:54
5	Facebook. Correct?	11:54
6	A. That's correct. The user said	11:54
7	this is my Facebook user name and password. I	11:54
8	would authorize you to access that on my behalf.	11:54
9	Q. And then you just said "access on	11:54
10	my behalf." It's actually the power.com Web site	11:54
11	that makes the connection to Facebook. Correct?	11:54
12	A. Well, the user is the one -- Yeah.	11:54
13	It gives that and then accesses it. It's very	11:54
14	similar if he's on Facebook and he says access my	11:54
15	other site, Facebook then accesses it on behalf of	11:54
16	the user at their instruction. It's exact same,	11:55
17	you know, methodology.	11:55
18	Q. But it is the power.com Web site	11:55
19	that is actually contacting Facebook. Correct?	11:55
20	A. Yes. Well, it's the -- they're --	11:55
21	they're at Power. They're inside power.com sites	11:55
22	so they're instructing Power to get or access	11:55
23	information.	11:55
24	Q. Do you consider Google to be a	11:55
25	browser?	11:55

184

1	you would be invited to ask your friends to join	02:37
2	power.com?	02:37
3	A. No. You would have the option to	02:37
4	invite your friends to join just like you have the	02:37
5	option on Facebook to invite your friends to join	02:37
6	Facebook and every other site on the Internet, and	02:37
7	if they did, if they reach a hundred friends that	02:37
8	joined, they would earn $100.	02:37
9	Q. And if you accepted the feature	02:37
10	that came up saying would you -- it said something	02:37
11	like, "Would you like to invite your friends to	02:37
12	Power"?	02:37
13	A. Yes.	02:37
14	Q. If you hit "yes" or "I agree" --	02:37
15	A. Yes.	02:37
16	Q. -- how -- what -- what	02:37
17	automation would occur at that point?	02:37
18	A. So first of all, you have to	02:37
19	remember that 99 percent of our users were not --	02:38
20	were not using -- were not using Facebook. They	02:38
21	were users on other sites, so we actually -- I	02:38
22	guess you could say we were actually a big source	02:38
23	of providing users to Facebook in Brazil. In fact,	02:38
24	as -- I guess you could say it was a gift, but we	02:38
25	-- we brought a large amount of Orkut users to	02:38

185

1	Facebook, so that's where a lot of our promotions	02:38
2	were -- Because our users already, as you know,	02:38
3	have -- Prior to having Facebook, we had millions	02:38
4	of users who have hundreds of friends already in	02:38
5	the system, and that represented 99 percent of our	02:38
6	contacts in our system. Facebook was a very small	02:38
7	part of this world. At that time, obviously it's a	02:38
8	much larger site today but in our world, in our	02:38
9	growth it was -- it was introduced later. So we	02:38
10	were encouraging our friends -- our users to go and	02:38
11	register at Facebook and become Facebook users.	02:38
12	Because in our -- in our view, the more social	02:38
13	networks that users were using, the more value it	02:39
14	would be to, you know, to aggregate different	02:39
15	sites. So we encouraged users to sign up for	02:39
16	Facebook. In fact, we're giving free marketing to	02:39
17	Facebook. So to answer your question, a lot of	02:39
18	these users -- You could see all your friends from	02:39
19	all your sites and say, "Hey. Join Facebook when	02:39
20	you're at Facebook." That was a big part of our	02:39
21	promotions. That was the largest part of our	02:39
22	promotions. And then, of course, if they have	02:39
23	friends that are already using Facebook -- Facebook	02:39
24	and they wanted to invite their friends to come use	02:39
25	Power, that's the smaller part. But the biggest	02:39

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1   technically it was -- it was much easier just to   02:42

2   manually look and I believe -- We can see how many   02:42

3   friends people invited so -- and then we just   02:42

4   manually took those people out. I think they were   02:42

5   -- When we provided it, I think there might have   02:42

6   been 30 or 40 people that achieved it, so it was   02:42

7   literally just looked on the list of people who   02:42

8   invited friends to Power who had more than a   02:42

9   hundred.   02:43

10   Q.   All right. But when say, "looked   02:43

11   on the list" you were looking in a database table.   02:43

12   Correct?   02:43

13   A.   Yeah. We went to our database.   02:43

14   Importing friends is a -- is a feature. It's a --   02:43

15   It's a -- As I mentioned many times, it's one of   02:43

16   our features on our site.   02:43

17   Q.   And in order to see how the   02:43

18   promotion was set up in terms of identification of   02:43

19   those who were participating in it, I'd need to see   02:43

20   the database. Correct?   02:43

21   A.   To see the -- Every single user on   02:43

22   our site has the option to invite friends. Who   02:43

23   achieved a hundred, I can tell you. I don't know   02:43

24   the number but it was 30 something people that   02:43

25   received -- that reached a hundred friends, so I   02:43

190

1   can tell you that every single user of our site had   02:43

2   the ability to invite friends. And if -- if some   02:43

3   of them reached a hundred, which was obviously not   02:43

4   an easy task to reach, they would -- they would win   02:43

5   this award, so I think only 30 something people   02:43

6   reached it, if I -- if I remember correctly.   02:43

7   Q.   All right.

8   A.   So I don't know if that answers   02:44

9   your question correctly.   02:44

10   Q.   What data was -- Whether it was   02:44

11   automatedly or manually viewed, what data was   02:44

12   viewed in order to determine who had invited 100   02:44

13   friends to join Facebook?   02:44

14   A.   Well, it's -- In the same -- When   02:44

15   any site creates an import or invitation, when a   02:44

16   friend registers because of your invitation, you   02:44

17   know this is -- This is a feature that was in our   02:44

18   site, always in our site. We know how many friends   02:44

19   were invited. We know how many friends were   02:44

20   converted. Just as Facebook publicly displays it   02:44

21   on their site and every other site does that. So   02:44

22   we just looked and saw the people that were above   02:44

23   the hundred on that date, and we -- and we -- and   02:44

24   we gave them a hundred dollar check.   02:44

25   Q.   And when you say you looked, you   02:44

192

1	Q. At this point, I haven't even	02:46
2	talked about E mail. All I meant is at the point	02:46
3	at which someone said yes they'd like to invite	02:46
4	their friends, the database would then recognize,	02:46
5	using its importer function and the idea of the	02:46
6	registered user Power, who the friends were.	02:46
7	Correct?	02:46
8	A. It would show you a list of all	02:46
9	your friends, yes, from your friends list.	02:46
10	Q. And the invitation to join was	02:46
11	then automatically forwarded to those friends	02:46
12	whether through E mail if you're on Orkut or some	02:46
13	other way on Facebook. Correct?	02:46
14	A. A user had to say, "I want to	02:46
15	invite this friend," so it's -- An authorized user	02:46
16	said, "Yes, these are my friends, and these are the	02:46
17	friends I want to invite to this site." That is	02:46
18	correct.	02:46
19	Q. All right. And at that point, an	02:46
20	automated script would contact whatever friends	02:46
21	were identified. Correct?	02:46
22	A. Depends on -- So if the friend was	02:46
23	a non-- Facebook did not provide E mails. If the	02:46
24	friend was, like, on another site and they had the	02:47
25	E mail, they could -- they could send on E mail	02:47

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1   friend. They could create an event or they could   03:01

2   go and, I guess, take that link up and paste it and   03:01

3   write an E mail to their friend.   03:01

4   Q.   Was one of the ways that Power was   03:01

5   able to make the invitation available to Facebook   03:01

6   users is that the PowerScript would set up an event   03:01

7   on Facebook on behalf of the user who had clicked   03:01

8   on --   03:01

9   A.   If the user authorized for the   03:01

10 creation of the event, yes.   03:01

11   Q.   And if the -- How did the -- How   03:01

12 did Power know it was to set up an event as opposed   03:01

13 to any other way of communicating --   03:01

14   A.   Because the user said, "Create an   03:01

15 event for me," so user authorized the creation of   03:01

16 an event.   03:01

17   Q.   Was that made available on the   03:01

18 promotion -- on the pop-up that made -- would come   03:01

19 up --   03:02

20   A.   That was -- As I said, if you   03:02

21 clicked that, that was one of the options that the   03:02

22 user had an option to create an event.   03:02

23   Q.   What other options did the user   03:02

24 have? We can take a break here.   03:02

25   THE VIDEOGRAPHER: It's 3:01. Off   03:02

273

1	Q. And it was sued, in part, because	04:41
2	of Facebook's allegations relating to how this	04:41
3	launch promotion was employed. Correct?	04:41
4	A. I don't know what Facebook made	04:41
5	allegations to is right there.	04:41
6	Q. Earlier you said that Facebook is	04:41
7	responsible for sending the E mail notification	04:41
8	about the invite.	04:41
9	A. Yeah. That was sent by Facebook	04:41
10	servers.	04:42
11	Q. But Facebook's E mail servers	04:42
12	would not send the invite, but for the initiation	04:42
13	of the event. Correct?	04:42
14	A. A user has to authorize -- A user	04:42
15	has to create an event for Facebook to do that and	04:42
16	a user has to log in with their user name and	04:42
17	password and do this, so Facebook authorizes its	04:42
18	users to create events as part of their -- That's	04:42
19	the relationship Facebook has with its users.	04:42
20	Q. You indicated some of the events	04:42
21	are set up through the automated scripted?	04:42
22	A. No. What I indicated is that	04:42
23	users -- users created these events. Whether the	04:42
24	user authorized -- whether they authorized an agent	04:42
25	to go do it for them or they did it, it's the same	04:42

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1	thing. It's initiated by the user, that's what we	04:42
2	know.	04:42
3	Q. The automated script, though, is	04:42
4	operated by power.com?	04:42
5	A. It's a -- An automated script for	04:42
6	PowerScript, are initiated by users and executed by	04:42
7	power.com in the same way that an exporter is	04:42
8	initiated by user and managed by the site that's	04:43
9	doing it on behalf of the user. Did you get that?	04:43
10	Yes.	04:43
11	(Whereupon, Exhibit 107 is marked	04:43
12	for identification by the reporter.)	04:43
13	Q. Mr. Vachani, Exhibit 107 is	04:43
14	Exhibit A to the first amended complaint that was	04:43
15	106. Have you seen this document before today?	04:43
16	A. What is this document I'm looking	04:43
17	at?	04:43
18	Q. Exhibit A to the first amended	04:43
19	complaint.	04:43
20	A. Is this the Facebook Terms and	04:43
21	Conditions?	04:43
22	Q. Yes.	04:43
23	A. I have -- Vaguely -- I've seen	04:44
24	this before, yes. I don't know if I've seen this	04:44
25	specific version. I've read the Facebook Terms and	04:44

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1          Q.        Do you see where it says,                    05:55
2     "Meanwhile, as you may know, Facebook has taken             05:55
3     technical measures to limit the interaction between         05:55
4     power.com and its network at this time"?                    05:55
5          A.        Yes.                                         05:55
6          Q.        Do you know what technical                   05:55
7     measures are being referred to there?                       05:55
8          A.        I don't.                                     05:55
9          Q.        Do you know if Facebook ever                 05:55
10    instituted an IP block Facebook -- on power.com's           05:55
11    IP addresses?                                               05:55
12         A.        Power.com has hundreds of IP                 05:55
13    addresses and they rotate so it would have -- it            05:55
14    would have refreshed -- Normally as we do, we had a         05:55
15    whole database, hundreds maybe even more IP                 05:55
16    addresses.                                                  05:55
17         Q.        Does power.com employ proxy                  05:55
18    servers?                                                    05:55
19         A.        We had proxy servers, yes.                   05:56
20         Q.        Were some of those hundred of IP             05:56
21    addresses the IP addresses of --                           05:56
22         A.        They were Amazon actually --                 05:56
23    because Amazon it refreshes IPs and there were many         05:56
24    other -- We had a bank of, you know -- of proxies           05:56
25    it was around -- constantly updating IPs.                   05:56
```

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1   Q.   My question was: Were any of the   05:56

2   IPs addresses you were referring to that power.com   05:56

3   employed proxy servers. IP addresses or IP proxy   05:56

4   servers?   05:56

5   A.   For -- I believe -- What do you   05:56

6   mean by "proxy servers."   05:56

7   Q.   Would they be servers that would   05:56

8   employ a different IP address than the IP address   05:56

9   which was contacting them?   05:56

10   A.   The -- Amazon as they're aware was   05:56

11   one of the primary sources of the IP addresses, and   05:56

12   Amazon has a wide range. It's pretty dynamic   05:56

13   because they have in the cloud we were implementing   05:56

14   there -- we were utilizing Amazon cloud along with   05:56

15   four other different sources of -- There was a   05:56

16   pretty wide range of IPs in our system.   05:57

17   Q.   Where would the documentation   05:57

18   exist that shows me what IP addresses were employed   05:57

19   by Power as of December 17, 2008?   05:57

20   A.   I believe IP addresses are dynamic   05:57

21   and constantly changing. It wouldn't be something   05:57

22   we would document.   05:57

23   Q.   IP addresses also are assigned in   05:57

24   ranges. Correct?   05:57

25   A.   I believe so. I don't know   05:57

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                    C E R T I F I C A T I O N

        I, PATRICIA MULLIGAN CARRUTHERS, a

Certified Court Reporter and Notary Public of the

State of New Jersey and a Notary Public of the

State of New York, do hereby certify that prior to

the commencement of the examination the witness was

sworn by me to testify as to the truth, the whole

truth, and nothing but the truth.

        I do further certify that the foregoing is

a true and accurate transcript of the testimony as

taken stenographically by and before me at the

time, place, and on the date hereinbefore set

forth.

        I do further certify that I am neither of

counsel nor attorney for any party in this action

and that I am not interested in the event nor

outcome of this litigation.

                Patricia Mulligan Carruthers, CCR

                Certificate No. XI00780

                Notary Public of the State of New York

                Notary Public of the State of New Jersey

Dated: JULY 27, 2011

My commission expires October 28, 2015.   (N.J.)

My commission expires December 21, 2013.   (N.Y.)

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JURAT

I, STEVEN VACHIANI, do hereby
certify that I have read the foregoing transcript
of my testimony taken on July 20, 2011, and have
signed it subject to the following changes:

PAGE   LINE   CORRECTION

DATE:

Sworn and subscribed to before me on this   day

of

NOTARY PUBLIC